

SERVED: April 14, 2006

NTSB Order No. EA-5219

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 13th day of April, 2006

_____)	
MARION C. BLAKEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-17332
v.)	
)	
WILLIAM ARTHUR LEE,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

Respondent has appealed from the written initial decision and order of Administrative Law Judge Patrick G. Geraghty in this matter, issued May 18, 2005.¹ The Administrator's order suspended respondent's private pilot certificate, based on an

¹ The law judge's order is attached.

alleged violation of 14 C.F.R. § 91.141.² After respondent answered the Administrator's complaint (admitting three allegations and denying one), the Administrator filed a pretrial motion for summary judgment pursuant to 49 C.F.R. § 821.17(d). The law judge granted this motion and ordered a 30-day suspension of respondent's private pilot certificate. We grant respondent's appeal of this decision.

In cases before the Board, a party may file a motion for summary judgment on the basis that the pleadings and other supporting documents establish that no material issues of fact exist, and that the party is therefore entitled to judgment as a matter of law. 49 C.F.R. § 821.17(d). We have previously considered the Federal Rules of Civil Procedure to be instructive in determining whether disposition of a case via summary judgment is appropriate. Administrator v. Doll, 7 NTSB 1294, 1297 n.14 (1991) (citing Fed. R. Civ. P. 56(e)). In this regard, we recognize that federal courts have interpreted the summary judgment standard as appropriate when no genuine issue

² Section 91.141 restricts operation of an aircraft in the proximity of certain parties:

No person may operate an aircraft over or in the vicinity of any area to be visited or traveled by the President, the Vice President, or other public figures contrary to the restrictions established by the Administrator and published in a Notice to Airmen (NOTAM).

of material fact exists. Celotex Corp. v. Catrett, 477 U.S. 317, 322-24 (1986).³

In the case at issue, a genuine issue of material fact exists with regard to whether respondent operated an aircraft contrary to the restrictions established by the Notice to Airmen ("NOTAM"). The Administrator attached a copy of the NOTAM in question to her motion for summary judgment. Complainant's Mot. for Summ J., Exh. 1 at 2. However, the Administrator has not presented undisputed evidence that resolves all factual issues regarding respondent's compliance with the NOTAM.

The NOTAM restricts flight in the vicinity that the Administrator's complaint alleges respondent violated.⁴ The NOTAM, however, permits flights within this area when an airman complies with six criteria, which include remaining in communication with air traffic controllers ("ATC"), having an

³ An issue is *genuine* if the evidence is sufficient for a reasonable fact-finder to return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255-56 (1986). An issue is *material* when it is relevant or necessary to the ultimate conclusion of the case. Id. at 248.

⁴ The NOTAM provides:

Pursuant to Title 14, Section 91.141, of the Code of Federal Regulations (CFR), aircraft flight operations are prohibited:

Within 30 NMR up to but not including FL180 of 340228N/1182521W or the LAX349006 from 0408121940 (1240 Local 08/12/04) until 0408131600 (0900 Local 8/13/04)[.]

Complainant's Mot. for Summ J., Exh. 1 at 2.

IFR or VFR flight plan, and squawking a discrete code to ATC. Complainant's Mot. for Summ. J., Exh. 1 at 2-3. The Administrator's complaint makes no reference to these criteria, nor does it allege that respondent operated contrary to these criteria. The complaint simply alleged that respondent piloted an aircraft that traveled within the boundaries of the restricted area. However, the Administrator acknowledges that the alleged violation "does not stem from [respondent's] flight into the boundaries of the TFR [temporary flight restriction], but rather, failure to comply with the NOTAM's directives to be (1) on an active VFR flight plan while in the TFR and (2) squawking code prior to departure and at all times while in the TFR." Administrator's Reply Brief at 6.

Respondent, in his March 2, 2005 Notice of Appeal, wrote "[a]gain, I state for the record and in my defense, that I was [c]leared and [d]irected by the FAA to continue my direction of flight that put me inside the Presidential TFR." In his June 7, 2005 appeal brief, respondent reiterates his position that he "was cleared by the FAA to [t]ravel within the [b]oundaries of the Presidential TFR." Respondent's Appeal Brief at 2. Further, respondent attached to his appeal brief a sectional chart with distinctive colors to indicate his route and the point at which he alleges he received permission to enter the restricted area from the appropriate ATC tower. Id. at Exh. B.

Although not in the form of a sworn affidavit (which would be preferable), we think that respondent's assertion that he fulfilled the requirements of the NOTAM raised a material factual issue with regard to this alleged violation of § 91.141. Moreover, we disagree with the Administrator's assertion that respondent did not raise this issue in a timely fashion: respondent clearly notified the Administrator of this defense in his March 2, 2005 Notice of Appeal. Because we find that genuine issues of material fact remain, we conclude that disposing of this case via summary judgment is improper.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is granted;
 2. The law judge's grant of summary judgment is reversed;
- and
3. This case is remanded to the law judge for hearing pursuant to 49 C.F.R. pt. 821 subpt. F.

ROSENKER, Acting Chairman, and ENGLEMAN CONNERS, HERSMAN, and HIGGINS, Members of the Board, concurred in the above opinion and order.